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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ELIZABETH P. et al., Persons
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

CARMEN P.,

Defendant and Appellant.

D053702

(Super. Ct. No. SJ11676A-C)

APPEAL from an order of the Superior Court of San Diego County, Carol
Isackson, Judge. Affirmed.

Carmen P. appeals an order denying her request to relieve her court-appointed attorney and appoint new counsel under *People v. Marsden* (1970) 2 Cal.3d 118. She contends she and her attorney had an irreconcilable conflict, and he misunderstood the law and refused to represent her in all relevant issues. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, when she was three years old, Elizabeth P. was placed with Carmen. Carmen later adopted Elizabeth and two younger children, Angelica P. and Manuel P. In August 2006 the San Diego County Health and Human Services Agency (the Agency) removed the children from Carmen's custody and petitioned on behalf of Elizabeth, alleging she had been subjected to acts of cruelty, including being forced to stand for hours as punishment, tied to a chair, not allowed to use the toilet until she soiled herself, hit with a belt or a cord, required to sleep and eat on the floor and deprived of food. The Agency also petitioned on behalf of Angelica and Manuel, alleging they were at risk because of the abuse Elizabeth had suffered. The Agency then filed an amended petition, adding that Carmen had caused scarring to the tops of Elizabeth's feet and denied her proper nutrition. The court ordered Elizabeth, Angelica and Manuel detained.

Subsequently, Carmen's husband, L.W., who had described the abuse of Elizabeth to authorities, recanted his accusations. Carmen submitted to amended petitions, and the court dismissed the original allegations and found true allegations that the children had been subjected to neglect.

However, Elizabeth then began to tell her therapist about how Carmen had abused her. She said Carmen tied her to a chair, hit her with a cord and would make her sit for a long time or stand on a square on the floor and not let her use the bathroom. This would sometimes cause Elizabeth to soil her clothes, and then Carmen would not feed her. Elizabeth reported additional abuse and said she was afraid Carmen would kill her and replace her with another child.

Based on Elizabeth's disclosures, the Agency filed subsequent petitions, alleging Elizabeth had been subjected to acts of cruelty, and Angelica and Manuel were at substantial risk because of the abuse of Elizabeth.

The jurisdictional hearing involved many days of testimony from numerous witnesses. During Elizabeth's testimony, she described how Carmen had abused her. Elizabeth's therapist testified Elizabeth was very clear and consistent in telling about the abuse; she repeated her allegations and never recanted. Four social workers supported Elizabeth's account of her life with Carmen.

Carmen denied abusing Elizabeth in any way. L.W. said his accusations against Carmen were false. Angelica denied Carmen had abused Elizabeth, and Carmen's older children, Brittnei B. and D.W., also denied the allegations.

At the close of the jurisdictional hearing, the court found the allegations true by clear and convincing evidence. Then, after admitting additional evidence and hearing further testimony, the court continued the three minor children as dependents of the juvenile court, and found that reasonable services had been provided but Carmen had made no progress with the case plan. The court terminated her services and set a Welfare and Institutions Code section 366.26 hearing.¹

Carmen sought writ review of the court's orders and appealed an order directing that there be no visitation between Brittnei and Elizabeth. This court denied Carmen's petition and affirmed the visitation order in nonpublished opinions—*Carmen P. v.*

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Superior Court (Nov. 20, 2008, D052918), and *In re Elizabeth P.* (Nov. 20, 2008, D053165). Carmen also brought a petition for a writ of habeas corpus, contending three of the attorneys who had represented her during the dependency period and hearings had provided ineffective assistance of counsel. This court held she had not shown ineffective assistance. (*In re Carmen P.* (Nov. 20, 2008, D053597).)

At a hearing under *People v. Marsden, supra*, 2 Cal.3d 118, the court granted Carmen's request that her then-attorney be relieved and new counsel be appointed. The court appointed Attorney Daniel Rooney.

Subsequently, Carmen said she had received a report indicating Elizabeth had engaged in sexual intercourse at the group home where she was residing. The social worker and Elizabeth's court-appointed special advocate (CASA) had reported there was an incident in July 2008 during which Elizabeth had sexually acted out with a boy at her group home. When the court commented that Carmen's attorney could bring a motion for the court to address Carmen's concerns about Elizabeth, Rooney said he was appointed only for the upcoming section 366.26 hearing and was not authorized to proceed on other issues. The court clarified that Rooney's appointment was not only for the section 366.26 hearing.

Carmen then requested Rooney be relieved and a new attorney be appointed. The court held a hearing on her request under *People v. Marsden, supra*, 2 Cal.3d 118. During the hearing, Carmen claimed Rooney had not responded properly when she asked him to find out more about Elizabeth's possible rape or sexual activity in her group home. She also said Rooney would not represent her in a federal civil rights law suit she was

pursuing. Carmen further informed the court that: she did not trust Rooney's representation of her and believed more money should be made available for expert witness fees; Rooney did not respond to issues she raised; Rooney did not approve of a declaration she planned to file; and Rooney had improperly received information from one of her former attorneys.

In response to Carmen's claims, Rooney explained he had extensive experience in dependency matters and said that he had been appointed for Carmen after she had been represented by five other attorneys. Rooney said he had explained to Carmen why he conducted his representation of her the way he did, why he could not acquire confidential information about the reported incident of Elizabeth's sexually acting out, and further that any information he had about Carmen's former attorneys had come from her. Rooney stressed that he could represent Carmen, but she must understand he would determine the course of the litigation.

The court ruled Rooney had provided proper representation and that it would not relieve him as Carmen's counsel. After Carmen continued to express her concern about the incident involving Elizabeth, Rooney stated he would like to have a hearing set to appoint a guardian ad litem for Carmen because she was not able to participate in her representation in a rational manner. The court stated such a motion should be made in a different courtroom.²

² Rooney later told Carmen he did not intend to request a hearing to appoint a guardian ad litem.

On August 14, 2008, the Agency requested the court to order that Elizabeth be placed on a new psychotropic medication, which her doctor had recommended. Carmen opposed the recommendation. At a special hearing, the court granted the request and authorized the new medication.³

DISCUSSION

Carmen asserts the court abused its discretion by denying her request for dismissal of Attorney Rooney and appointment of new counsel. She argues the fact that Rooney was seeking a guardian ad litem for her demonstrates there was an irreconcilable conflict between attorney and client. Furthermore, Carmen claims that Rooney should have been replaced as he failed to protect her interests by refusing to seek information about Elizabeth's molestation and/or sexual conduct and that he misunderstood a child's guardian ad litem's right to invoke the privilege of confidentiality. Carmen also argues Rooney provided misinformation to the court about the scope of his representation. We determine Carmen's arguments are without merit and that the court did not abuse its discretion in denying her *Marsden* motion.

Section 317.5, subdivision (a) provides: "All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel." To establish that counsel in a dependency proceeding is ineffective, a parent "must demonstrate both that: (1) his appointed counsel failed to act in a manner expected of reasonably

³ Carmen's notice of appeal states she is appealing from the order authorizing the new psychotropic medication. However, she offers no argument concerning this order. We thus consider the issue to be abandoned.

competent attorneys acting as diligent advocates; and that (2) this failure made a determinative difference in the outcome, rendering the proceedings fundamentally unfair in that it is reasonably probable that but for such failure, a determination more favorable for [the parent's] interests would have resulted.'" (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.) A reviewing court considers a challenge to denial of a *Marsden* motion under an abuse of discretion standard. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1128.) Applying this standard, we determine that Carmen's appeal lacks merit.

Carmen's assertion that Rooney should have been replaced as her counsel because the court ordered him to file a motion regarding allegations about sexual activity in Elizabeth's group home, but he failed to do so, is not supported by the record. Instead, the record establishes that the court merely said if Carmen wished to pursue the matter, it should be done by a specific motion at a different hearing.

Similarly, Carmen's claims that Rooney's failure to adequately investigate the allegations of Elizabeth's sexual misconduct while in a group home demonstrates that (1) he did not understand a child's guardian ad litem's right to invoke privilege; and (2) he failed to protect her interests are without merit. Medical or psychological information regarding Elizabeth was protected under attorney-client, physician-patient and psychotherapist-patient privileges. (Evid. Code, §§ 990-993, 1010-1013.) The holder of the privilege was Elizabeth's counsel. (Evid. Code, § 993, subd. (b); *In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1265-1266.) Elizabeth's counsel would not waive the privileges on Elizabeth's behalf. Consequently, Rooney did not fail to understand the law relating to privilege or fail to conduct an adequate investigation as alleged. Furthermore,

Carmen has not shown that the failure to secure information about Elizabeth's sexual misconduct prejudiced her in any manner. While Carmen claims the information would have been relevant to Elizabeth's adoptability, the court had not set the section 366.26 hearing, and Elizabeth's permanent plan was not yet under consideration.

Finally, Carmen has not shown Rooney was unwilling or unable to fully represent her. As the court explained to Carmen, Rooney was retained to represent her in the dependency proceedings, not in an independent federal action. Rooney represented to the court he was an experienced dependency attorney and was ready and able to represent Carmen, but that he would make all tactical decisions regarding the representation. As counsel, Rooney was entitled to make such decisions. (*In re Kerry O.* (1989) 210 Cal.App.3d 326, 333.) "An attorney for a parent in dependency proceedings must have meaningful input from his or her client in order to advocate on the parent's behalf." (*In re M.F.* (2008) 161 Cal.App.4th 673, 680.) Rooney's representation to the court that he might seek appointment of a guardian ad litem for Carmen to assist in her representation was within an attorney's reasonable professional judgment. Had such a motion been made, it would have been for the purpose of facilitating Carmen's representation in the dependency proceeding, not impeding it. Consequently, Carmen has failed to establish an abuse of discretion and we affirm.

DISPOSITION

The order is affirmed.

IRION, J.

WE CONCUR:

McINTYRE, Acting P. J.

AARON, J.